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No. 97-569

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

BURLINGTON INDUSTRIES, INC.,

Petitioner,

vs.

KIMBERLY B. ELLERTH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the victim of "*quid pro quo*" sexual harassment under Title VII of the Civil Rights Act of 1964, as amended, November 21, 1991, 42 U.S.C. § 2000e, *et seq.*, must show that s/he either was forced to have sex with the harasser or was denied an economic job benefit/suffered an economic job detriment in order to recover; and

2. Whether non-economic injury is compensable in sexual harassment cases where the victim's supervisor, acting within the scope of his employment, apparent or delegated authority, has explicitly or implicitly conditioned an employment benefit or detriment on the performance of sexual favors.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Alice Jansen and Packaging Corporation of America were parties before the Court of Appeals (No. 96-1361) due to consolidation of their case with the instant case for decision. The Equal Employment Opportunity Commission (EEOC) participated in the briefing and oral argument of this case as *amicus curiae*.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	v
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provision Involved	1
Statement of the Case	2
A. Response to Burlington's Statement of the Facts of the Case.	2
B. Procedural History	7
Reasons for Denying the Writ	12
I. The Petition Should Be Denied Because The Circuits Are Not Conflicted Regarding The Standard For Employer Liability For *Quid Pro Quo* Sexual Harassment, Nor Does A Conflict Exist Regarding Whether Non-Economic Injury Is Compensable Under Title VII.	12

Contents

Page

A. The Circuits Uniformly have Held Employers Liable for "*Quid Pro Quo*" Sexual Harassment under Title VII. 12

B. A Majority of Circuits which have Addressed the Issue of "*Quid Pro Quo*" Sexual Harassment have Held or Acknowledged that Title VII Does Not Require an Additional Showing of an Economic Adverse Job Action. 15

II. The Petition Should Be Denied Because The Opinion Below On The Issue Of *Quid Pro Quo* Sexual Harassment Is In Harmony With This Court's Ruling In *Meritor*, And With The Common Law Of Agency. 20

A. Employer Liability in Cases of "*Quid Pro Quo*" Sexual Harassment Follows This Court's Directive in *Meritor* to Look to "Agency Principles" to Determine Who Acts as an "Agent" under Title VII. 20

B. Under *Meritor*, and as Codified by The Civil Rights Act Of 1991, Non-Economic Harm is Compensable under Title VII. 25

Conclusion 27

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Baskerville v. Culligan Intern. Co., 50 F.3d 428 (7th Cir. 1995) 21, 23

Bouton v. BMW of North Am., Inc., 29 F.3d 103 (3d Cir. 1994) 13

Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) 15

Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393 (5th Cir. 1996) 14

Carerro v. New York City Hous. Auth., 890 F.2d 569 (2d Cir. 1989) 17

Chamberlain v. 101 Realty, Inc., 915 F.2d 777 (1st Cir. 1990) 15, 16, 19

Collins v. Baptist Memorial Geriatric Ctr., 937 F.2d 190 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 989 (1992) 17, 18

Cram v. Lamson Sessions Co., 49 F.3d 466 (8th Cir. 1995) 17

Crimm v. Missouri Pacific R.R., 750 F.2d 703 (8th Cir. 1984) 15

Contents

	Page
Dunning v. Simmons Airlines, Inc., 62 F.3d 863 (7th Cir. 1995)	26
Ellert v. University of Texas, at Dallas, 52 F.3d 543 (5th Cir. 1995)	18
Farley v. American Cast Iron Pipe Co., 115 F.3d 1548 (11th Cir. June 30, 1997)	13
Gary v. Long, 59 F.3d 1391 D.C. Cir.), *cert. denied*, 116 S. Ct. 569 (1995)	20
Green Hills Country Club v. Illinois Human Rights Comm'n, 162 Ill. App. 3d 216, 113 Ill. Dec. 216, 514 N.E. 2d 1227 (5th Dist. 1987)	11, 22
Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993)	15, 25
Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. May 8, 1997)	14, 20
Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)	13
Heyne v. Caruso, 69 F.3d 1475 (9th Cir. 1995).	17
Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987)	17, 19
Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644 (6th Cir. 1986)	15, 17, 18

Contents

	Page
Horn v. Duke Homes, Div. of Windsor Mobile Homes, 755 F.2d 599 (7th Cir. 1985)	23, 26
Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417 (7th Cir. 1986)	23
Jansen v. Packaging Corp. of Am. (95-3128)	2, 9
Karibian v. Columbia Univ., 14 F.3d 773 (2d Cir.), *cert. denied*, 512 U.S. 1213, 114 S. Ct. 2693, 129 L. Ed. 2d 824 (1994)	14, 17, 24, 26
Kauffman v. Allied Signal, Inc., 970 F.2d 178 (6th Cir.), *cert. denied*, 506 U.S. 1041, 113 S. Ct. 831, 121 L. Ed. 2d 701 (1992)	15, 17, 18
Knox v. State of Indiana, 93 F.3d 1327 (7th Cir. 1996)	26
Kotcher v. Rosa Sullivan Appliance Ctr., Inc., 957 F.2d 59 (2d Cir. 1992)	17
Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988)	15, 19
Martin v. Cavalier Hotel Corp., 48 F.3d 1343 (4th Cir. 1995)	14, 22
Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986)	15, 20, 21, 23, 24, 25, 26

Contents

Page

Nichols v. Frank, 42 F.3d 503 (9th Cir. 1994) ... 14, 16, 24, 26

Robinson v. City of Pittsburgh, 120 F.3d 1286, 1997 U.S. App. LEXIS 17800, *21 (3d Cir. July 14, 1997) . 13, 16, 26

Sauers v. Salt Lake County, 1 F.3d 1122 19

Saxton v. American Tel. and Tel. Co., 10 F.3d 526 (7th Cir. 1993) 23

Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990) ... 23

Smart v. Ball State Univ., 89 F.3d 437 (7th Cir. 1996) . 26

Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554 (11th Cir. 1987) 19

Spencer v. Gen. Elec. Co., 894 F.2d 651 (4th Cir. 1990) 16, 17, 19

Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311 (11th Cir. 1989) 13

Torres v. Pisano, 116 F.3d 625, 1997 U.S. LEXIS 12805, *18-19 (2d Cir. June 3, 1997) 13, 14

Vinson v. Taylor, 23 FEP Cases (BNA) 37 (D.D.C. 1980), *rev'd, Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985) 21

Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985), *aff'd, Mentor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) 21

Contents

Page

Statutes Cited:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 2

28 U.S.C. § 1367(a) 2

28 U.S.C. § 1652 ..... 11, 22

42 U.S.C. § 1981a(b) 8, 10, 25, 26

42 U.S.C. § 2000e *et seq.* ..... i, 2

42 U.S.C. § 2000e(b) 20

42 U.S.C. § 2000e-2(a)(1) 1

Other Authorities Cited:

29 C.F.R. § 106.11(a)(1) (1993) 16

29 C.F.R. § 106.11(a)(2) (1993) 16

29 C.F.R. § 1604.11(a)(1-2) (1986) 19

29 C.F.R. § 1604.11(c) (1993) 13

EEOC Policy Guidance on Current Issues of Sexual Harassment, 8 Fair Empl. Prac. Man. (BNA) 405:6681, at 6694 (Mar. 19, 1990) 14, 16

Contents

	Page
Restatement (Second) of Agency, § 219	21
Restatement (Second) of Agency, § 219(1) (1958)	9, 11, 13, 22, 23
Restatement (Second) of Agency, § 219(2)(b)	9, 22
Restatement (Second) of Agency, § 219(2)(d)	9, 10, 13, 24, 25
Restatement (Second) of Agency, §§ 228-230	9, 13, 23

Respondent, Kimberly B. Ellerth, respectfully requests that Burlington's petition for a writ of certiorari on the issue of "*quid pro quo*" sexual harassment be denied.

OPINIONS BELOW

The August 12, 1997 decision of the United States Court of Appeals for the Seventh Circuit, *en banc*, can be found at App. 1a-208a.[1] The November 27, 1996 three-judge panel opinion of the Seventh Circuit is located at App. 209a-239a. The January 19, 1996 opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is located at App. 241a-287a.

STATEMENT OF JURISDICTION

The judgment of the *en banc* panel of the United States Court of Appeals for the Seventh Circuit was entered on August 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, November 21, 1991, 42 U.S.C. § 2000e-2(a)(1):

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of

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1. All references in this cross-petition to "App." followed by a number or numbers are intended to refer to a page or pages in the appendix to Burlington's petition for a writ of certiorari.

such individual's race, color, religion, sex or national origin.

STATEMENT OF THE CASE

Kimberly B. Ellerth ("Ellerth") brought this suit against Petitioner, Burlington Industries, Inc. ("Burlington"), in the United States District Court for the Northern District of Illinois, Eastern Division, alleging sexual harassment and constructive discharge under Title VII of the Civil Rights Act of 1964, as amended, November 21, 1991, 42 U.S.C. § 2000e *et seq.* ("Title VII"). The district court's jurisdiction over the case was under Title VII, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.*. Federal question jurisdiction in the district court was under 28 U.S.C. § 1331, and pendant jurisdiction for the constructive discharge claim was under 28 U.S.C. § 1367(a).

In the *en banc* opinion below (consolidated with *Jansen v. Packaging Corp. of Am.* (95-3128) for decision), the Seventh Circuit, in a *per curiam* opinion, held that Ellerth had a viable claim of "*quid pro quo*" sexual harassment under a "scope of employment" or "delegated authority" analysis for which the employer was liable.

A. Response to Burlington's Statement of the Facts of the Case.

Respondent herein addresses those portions of Burlington's statement of fact which she perceives contain misstatements or require clarification:[2]

Regarding the position of Theodore Slowik ("Slowik") at

2. *See also* Ellerth's "Facts of the Case" portion to her Cross-Petition for a writ of certiorari.

Burlington and his authority over Ellerth, Slowik was Vice President of Sales and Marketing for Burlington's Mattress "Ticking" Division throughout Ellerth's employment. Prior to her promotion, Ellerth reported to Mary Strenk Fitzgerald, National Accounts Manager, who reported to Slowik. After her promotion, Ellerth reported to Patrick Lawrence ("Lawrence"), who reported to Slowik. Slowik testified that he had "ultimate decision-making power" regarding Ellerth's promotion. Slowik had the power to both hire and fire Ellerth, and indeed did interview and hire Ellerth for both of the positions which she held with the company. Ellerth was required to speak with Slowik by telephone about once per week. She also had contact with Slowik during her training trips and business conferences in New York; Greensboro, North Carolina; San Francisco, California; and when Slowik would travel to Chicago, Illinois. In addition, after Ellerth's promotion to territorial sales representative, Slowik was the sole person from whom she could obtain permission for special projects for her customers.

Ellerth did not complain "for the first time" about Slowik's sexual harassment against her three weeks after resigning. Ellerth complained to Donna Thibideau, Burlington's Customer Service Manager, about Slowik's sexual harassment between January and March, 1994. In addition, Angelo Brenna ("Brenna"), Burlington's Vice President of International Sales, was present with Ellerth at a business lunch wherein Slowik told "well over ten" offensive sexual jokes and grabbed Ellerth's knee under the table. As Ellerth walked back to the office a few feet ahead of Brenna and Slowik, Slowik stated, "[y]ou have got great legs, Kim. What do you think Angelo?" as Slowik stared at Ellerth's legs. Upon Ellerth's return to the New York office, she complained to Marilyn, "sample" person, and to Laura Peffal, Customer Service Representative, about Slowik and Brenna's behavior. During Ellerth's employment at Burlington, she also complained about Slowik's sexual harassment to Sherry

Hester, Customer Service Representative; Brent Schneider, Sales Representative; Patrick Crosson, Sales Representative; Cara Jimenez, a Burlington Customer; and to Slowik, himself. A sales representative named Dan was a witness to loud, obnoxious, sexually offensive and embarrassing comments by Slowik in front of Ellerth regarding a waitress' appearance. Another of Burlington's employees was present when Slowik stated to Ellerth, "On your knees again Kim," which Ellerth understood as a reference to fellatio, and found degrading and offensive. On May 31, 1994, Ellerth left a telephone answering-machine message with Patrick Lawrence ("Lawrence"), Ellerth's post-promotion direct supervisor, and sent him a resignation letter. Ellerth whited-out that portion of her resignation letter to Lawrence regarding the sexual harassment against her on the advice of her husband, which was telefaxed with blank spaces from the redaction.[3] About three weeks later, Ellerth sent a second letter to Lawrence, stating:

> Before I was hired, you and I spoke about the reasons why Ted [Slowik] didn't feel comfortable around me. I told you that he had said some sexually inappropriate things to me in the past. What I didn't tell you was that he had, on two occasions, patted my rear, and every time he saw me looked me up and down like a piece of meat. . . . My entire time at Burlington, I had to ignore Ted [Slowik] and try to do what I needed to do in my job.

In the summer of 1993, during the North Carolina training

3. That portion of the letter had read:

> What I did not want to mention to you was the fact that Ted [Slowik] had harassed me in the past and I simply ignored him to save my job. . . . Needless to say, these incidents could be seen as sexual harassment. . . . What a shame that one man can have such an influence.

trip, Ellerth accompanied Slowik to the hotel lounge after he had requested that she do so. After Slowik's sexual comments and staring regarding the female band members and Ellerth's breasts and legs, and as Ellerth was exiting the lounge, Slowik stated to her, "[y]ou know, Kim, I could make your life very hard or very easy at Burlington."[4] Ellerth understood this comment as clearly implying that she would have to engage in sexual relations with Slowik in order to succeed in the business. Slowik's implication that he could make life very hard or very easy, depending on whether Ellerth engaged in sexual relations with him, was clear to Ellerth given the totality of the circumstances up to that point, namely Slowik's prior inappropriate comments regarding Ellerth's appearance and her intimate marital relations, his staring at her breasts and legs, and his unwelcome and offensive touching of her knee.

In around March, 1994, the prior Midwest sales representative told Ellerth that Slowik was reluctant to promote her because she was "arrogant." Lawrence also told Ellerth that Slowik had made this statement. During Slowik's promotion interview of Ellerth in March, 1994, Slowik admitted to Ellerth that he had told other employees at Burlington (including her potential supervisor-to-be, Lawrence) that she was "arrogant" and told Ellerth that he had hesitations about promoting her. When Ellerth asked, "[i]s it because I'm not loose enough for

4. Although the district court ruled that pre-December 20, 1993 comments did not fall within the "continuing violation" doctrine, it was made clear that "this does not require that an 'iron curtain' be dropped on December 20, 1993, shielding from consideration all evidence of Slowik's conduct before that day . . .". (App. 261a.) The district court held that "the severity or pervasiveness of Slowik's conduct must be evaluated with reference to his prior conduct," and held that when the later instances of sexual harassment "are viewed in the context of Slowik's pre-December 20 conduct, it is clear to this Court that it cannot hold, as a matter of law, that Ellerth was not subject to a hostile work environment." (App. 263a.)

you, Ted?" Slowik responded in the affirmative. During this interview, Slowik reached over and rubbed Ellerth's knee again, and, when discussing travel associated with the new job, stated "[i]sn't your husband going to miss you?" Slowik later telephoned Ellerth and told her that she had been promoted despite his hesitations, and, in the same conversation, made a sexually inappropriate comment which caused Ellerth to cry.[5]

In approximately May, 1994, when Ellerth telephoned Slowik to obtain permission to perform a special project for a customer, Slowik responded, "I don't have time for you right now, Kim — unless you tell me what you are wearing." Ellerth said she had to go and hung up. Also in May, 1994, when Ellerth telephoned Slowik to again request his permission to do the same project, Slowik responded, "[a]re you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier."[6]

Regarding the alleged complaints about Ellerth's work, Ellerth was not informed of any such complaints during the May, 1994 meeting between Ellerth and her new supervisor, Lawrence. On May 22, 1994, Lawrence sent Ellerth a letter regarding her non-return of telephone calls from two customers and three employees. The letter refers to a May 18, 1994 conversation with Ellerth, which Ellerth contends did not take place.

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5. While Burlington contended that Slowik had the power to "recommend" Ellerth for promotion, Ellerth contended and believed that Slowik had final decision-making responsibility regarding her promotion. Slowik himself testified that he had "ultimate decision-making power" regarding this promotion.

6. Ellerth was not granted permission by Slowik to perform the project. Although Burlington attempted to minimize this project in its petition for rehearing *en banc*, there is no evidence in the record regarding the precise nature of the project Ellerth was denied permission to perform.

As Burlington states, Ellerth did not succumb to Slowik's sexual demands by performing any sexual favors for Slowik, but she did "otherwise respond," as is illustrated by her reactions to those threats and her complaints to the Customer Service Manager and other employees at Burlington. Regarding Burlington's policy against sexual harassment, while Ellerth stated that she had read the Burlington Company employee handbook, she stated that she was not aware of whether it was being enforced, whether it was in effect throughout her employment, or who to complain to should she experience a problem with sexual harassment. Indeed, in response to her complaint to the Customer Service Manager, Ellerth was told that Ann Pillow may also have been sexually harassed by Slowik.

B. Procedural History

Burlington moved for summary judgment against Ellerth in the United States District Court for the Northern District of Illinois, Eastern Division, claiming that Burlington was not liable for the sexual harassment against Ellerth and that Ellerth was not constructively discharged. With regard to the *quid pro quo* sexual harassment,[7] the district court held that Ellerth, in labeling her allegation "sexual harassment" in her charge of discrimination, had failed to state a claim for "*quid pro quo*" sexual harassment. (App. 216a-217a, 219a-220a, 284a.) Viewing Ellerth's claim, instead, as a hostile work environment claim with a "*quid pro quo* component," the district court granted Burlington's summary judgment motion on the ground that agency principles did not impute liability to the employer for hostile work environment sexual harassment or for constructive discharge.[8] (App. 261a-265a, 283a-286a.) Regarding the *quid*

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7. *See* Ellerth's Cross-Petition for a writ of certiorari for discussion of Ellerth's "hostile work environment" claim.

8. Although the district court did not reach the *quid pro quo* sexual (Cont'd)

pro quo claim, the district court acknowledged that *quid pro quo* sexual harassment has "generally been treated as giving rise to strict liability," but stated that:

> although the *quid pro quo* element of Ellerth's hostile environment is not insubstantial, the gravamen of her complaint is, by far, predicated on Slowik's persistent unwelcome comments of a sexual nature, . . .[9]

(App. 280a, 284a.)

(Cont'd)
harassment claim, it posited that "there is authority to the effect" that Ellerth would have to prove that Slowik withheld "tangible employment benefits" in order to prove such a claim. (App. 264a, n.10.) The district court did not state, however, whether Slowik's withholding of permission to perform a project for a customer was a "tangible" job detriment, and did not analyze or distinguish those circuits holding that a showing of economic injury is not required in cases of "*quid pro quo*" sexual harassment. *See* Section I, B, *infra*; Civil Rights Act of 1991, 42 U.S.C. § 1981a(b).

9. In so holding, the district court acknowledged that

> it would not be unreasonable to conclude that every effort toward achievement that Ellerth made at Burlington was tainted by Slowik's threat, "I could make life very hard for you."

(App. 264a-265a.) The district court also stated that Slowik's statement during the March, 1994 promotional interview:

> could be regarded as reinforcing Slowik's previous persistent implicit messages to [Ellerth] that her value was as a sex object and that her growth in the company was dependent upon her sexual availability to him. So too could the jury find with respect to the April [sic] 1994 phone conversation[s] in which Ellerth called to request special permission. . . . Surely, a reasonable jury could find this comment tantamount to saying "I, as your supervisor[,] will have no time for you and will not assist you unless you talk dirty to me,". . .

(App. 263a.)

A three-judge panel of the Seventh Circuit (Bauer, Rovner and Wood, J.J.) reversed the district court, holding that no requirement existed that complainants plead particular sub-theories of sexual harassment at the time of their charge of discrimination, and holding that Burlington was liable for the sexual harassment[10] by Slowik under a "scope of authority" analysis. *See* Restatement (Second) of Agency, § 219(1) (1958).[11] (App. 219a-221a, 230a-231a.)

The Seventh Circuit thereafter granted Burlington's petition for rehearing *en banc*, and the three-judge panel decision was vacated. Nine of the twelve judges of the *en banc* panel of the Seventh Circuit affirmed the decision of the three-judge panel holding Burlington liable for the "*quid pro quo*" sexual harassment against Ellerth, under a "scope of employment" or "delegated authority" analysis.[12] (App. 6a-7a, 173a.) The majority of the of the *en banc* panel maintained the judicially-created distinction between "hostile work environment" and "*quid pro quo*" sexual harassment. (App. 6a-7a.)

The plurality opinion by Judge Flaum (joined by Cummings, Bauer, Cudahy,[13] Kanne (in part),[14] and Evans, J.J.) maintained the

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10. Both "hostile work environment" and "*quid pro quo*," although a distinction was not made in the three-judge panel opinion with regard to employer liability between these two "types" of sexual harassment.

11. All references herein to "Restatement," "§ 219(1)," "§ 219(2)(b)," "§ 219(2)(d)," and "§§ 228-230" are intended to refer to the Restatement (Second) of Agency (1958), or sections thereof.

12. The *en banc* Court did not limit it's review to the one *quid pro quo* statement cited by Burlington in its petition (p. 6, n.4), but reviewed all of Slowik's *quid pro quo* statements. (App. 27a, 200a-201a.) Ellerth's claim of constructive discharge, although plead, was not addressed as such by the *en banc* panel.

13. In 95-3128 (*Jansen*) only.

14. Judge Kanne's separate concurring opinion stated that a
(Cont'd)

distinction between *quid pro quo* and hostile environment sexual harassment and found Burlington liable for Slowik's *quid pro quo* sexual harassment against Ellerth under a "delegated authority" analysis.[15] (App. 12a-14a, 17a.) *See* Restatement, § 219(2)(d). The plurality opinion rejected the imposition of an economic benefit/detriment requirement in cases of *quid pro quo* sexual harassment, stating that

> a clear and serious *quid pro quo* threat alters the "terms and conditions" of employment in such a way as to violate Title VII and therefore can constitute an actionable claim even if the threat remains unfulfilled.

(App. 17a-19a.) This is true as "[a]n employee who does not submit [to the *quid pro quo* demand] may well undergo anxiety, distress, and loss of productivity regardless of whether the threat is carried out." (App. 19a.) The plurality opinion stated that many of the cases previously requiring an adverse job consequence in order for employer liability to attach in *quid pro quo* cases had been decided prior to the Civil Rights Act of 1991, 42 U.S.C. § 1981a(b), which now provides compensation for emotional damage. (App. 18a.)

The separate opinion of Judge Easterbrook (concurring in

(Cont'd)
negligence standard would adequately serve the deterrence goal of Title VII in both hostile work environment and *quid pro quo* sexual harassment cases. (App. 33a.) Judge Kanne noted that "the training, authority, and control given supervisors by an employer will . . . always enter the negligence equation." (App. 34a.)

15. The plurality also recognized that an employer may be held liable for *quid pro quo* sexual harassment where the threat exceeds the supervisor's actual authority, but the victim had a reasonable belief that the supervisor had the authority from the employer to carry out the threat, *i.e.*, "apparent authority." *See* Restatement, § 219(2)(d). (App. 19a-20a.)

part and dissenting in part), and the concurring and dissenting opinion of Judge Wood (joined by Easterbrook and Rovner, J.J.), did not draw any line separating different forms or types of sexual harassment, and stated that an employer could be held liable for sexual harassment under state law or under a "scope of authority" analysis. *See Green Hills Country Club v. Illinois Human Rights Comm'n*, 162 Ill. App. 3d 216, 113 Ill. Dec. 216, 514 N.E. 2d 1227 (5th Dist. 1987) (employers "strictly liable" in Illinois for both *quid pro quo* and hostile work environment sexual harassment by supervisory personnel); Rules of Decision Act, 28 U.S.C. § 1652; Restatement, § 219(1). (App. 143a-152a, 173a-176a, 184a-186a, 193a-195a.) Judge Easterbrook's separate concurring and dissenting opinion added that, although he did not distinguish between types of sexual harassment in reaching his conclusions, under the "hostile work environment"/"*quid pro quo*" paradigm adopted by the majority, he would hold the employer liable in Ellerth's case under a "hostile work environment" theory. (App. 146a, 151a-152a.)

Chief Judge Posner, in his concurring and dissenting opinion (joined by Judge Manion), maintained the distinction between the two types of sexual harassment and did not agree that Burlington should be held liable, stating that employers should only be liable for *quid pro quo* sexual harassment under a "delegated authority" analysis if there is a "company act," *i.e.*, economic job detriment. (App. 52a-55a.) Chief Judge Posner stated that the requirement of a "company act" has "at least a footing" in the case law, although "[i]t is, for sure, not the orthodox approach." (App. 52a.) Judge Manion's concurring and dissenting opinion (joined by Chief Judge Posner) similarly stated that strict liability for *quid pro quo* sexual harassment should be limited to situations where the plaintiff suffered a "tangible [economic] job detriment," *i.e.*, "adverse employment action." (App. 158a-160a.) Judge Coffey's concurrence and dissent rejected "strict liability" for all cases of *quid pro quo*

sexual harassment, with or without economic loss, applying a negligence theory to both hostile work environment and *quid pro quo* cases. (App. 7a.)

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE THE CIRCUITS ARE NOT CONFLICTED REGARDING THE STANDARD FOR EMPLOYER LIABILITY FOR *QUID PRO QUO* SEXUAL HARASSMENT, NOR DOES A CONFLICT EXIST REGARDING WHETHER NON-ECONOMIC INJURY IS COMPENSABLE UNDER TITLE VII.

A. The Circuits Uniformly have Held Employers Liable for "*Quid Pro Quo*" Sexual Harassment under Title VII.

As explored by Judge Manion in his separate opinion, at least eight other circuits, in addition to the Seventh Circuit, have either expressly embraced what has been termed a "strict liability"[16] standard for "*quid pro quo*" sexual harassment, or commented that the other circuits uniformly impose employer liability in such cases. (App. 157a, n.2.) Adding a review of the Third, Eighth, and D.C. Circuits to this analysis, the total

16. In the vacated three-judge panel opinion (Bauer, Rovner and Wood, J.J.) and in the *en banc* panel separate opinion by Judge Wood (joined by Easterbrook and Rovner, J.J.) (endorsing the three-judge panel opinion) issue was taken with use of the term "strict liability," which was designed to refer to a tort rule which "encourage[s] people to exercise greater care when undertaking socially beneficial but abnormally hazardous activities." (App. 173a, 176a, n.2; 182a, 231a.) The result achieved by courts' application of the standard termed "strict liability" in "*quid pro quo*" cases "is, in fact, nearly identical to the result produced by properly applied agency principles." (App. 182a.)

comes to at least twelve circuits holding or acknowledging that employers are liable for "*quid pro quo*" sexual harassment.[17] *See also* 29 C.F.R. § 1604.11(c) (1993) (an employer "is responsible for its acts and those of its agents and supervisory employees . . . regardless of whether the specific acts complained of were authorized or even forbidden by the employer"); Restatement, §§ 219(1), 219(2)(d) and 230.

The Third Circuit, in *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1997 U.S. App. LEXIS 17800, *21, n.9 (3d Cir. July 14, 1997), held that

> courts have unanimously held that an employer is strictly liable for *quid pro quo* sexual harassment by a supervisor having actual or apparent authority to carry out the threat or promise that is made to the victim.

See also Bouton v. BMW of North Am., Inc., 29 F.3d 103, 107 (3d Cir. 1994).

The Eleventh Circuit, in *Farley v. American Cast Iron Pipe Co.*, 115 F.3d 1548, 1552 (11th Cir. June 30, 1997), stated that "[s]trict liability obtains in a *quid pro quo* context" because the supervisor, "by definition, acts as the company." *See also Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989); *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982).

In *Torres v. Pisano*, 116 F.3d 625, 1997 U.S. LEXIS 12805,

17. In the instant case, the district court, as well, stated that *quid pro quo* sexual harassment "has generally been treated as giving rise to strict liability on the part of the employer." (App. 280a.) The three-judge panel decision similarly stated that employer liability for "*quid pro quo*" sexual harassment was the result reached by other circuits. (App. 231a.)

*18-19 (2d Cir. June 3, 1997), the Second Circuit stated that "liability for *quid pro quo* sexual harassment is always imputed to the employer." *See also Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir.), *cert. denied*, 512 U.S. 1213, 114 S. Ct. 2693, 129 L. Ed. 2d 824 (1994) ("because the *quid pro quo* harasser, by definition, wields the employer's authority to alter the terms and conditions of employment . . . the law imposes strict liability . . .").

The Tenth Circuit, in *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1443 (10th Cir. May 8, 1997) (collecting cases), held that "[i]n cases involving *quid pro quo* harassment, courts routinely hold, with little or no discussion, that the employer is 'strictly liable' for the supervisor's wrongful conduct." This imposition of "strict liability" presumably rests on the fact that "the supervisor was acting within the scope of his actual or apparent authority when he committed the harassment." *Id.*

The Fifth Circuit stated that "[c]ourts have held an employer strictly liable for '*quid pro quo*' harassment." *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 397 (5th Cir. 1996).

In *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 n.3 (4th Cir. 1995), the Fourth Circuit stated that the defendant "recognizes that in *quid pro quo* sexual harassment cases an employer is automatically liable for its supervisor's conduct." The Ninth Circuit, in *Nichols v. Frank*, 42 F.3d 503, 513 (9th Cir. 1994) (collecting cases), held that because a "harasser is able to grant . . . job benefits or detriments only because he has actual or apparent authority to do so," "[o]nce *quid pro quo* sexual harassment has been established, the harasser's employer is, *ipso facto*, liable." *Citing* EEOC Policy Guidance on Current Issues of Sexual Harassment, 8 Fair Empl. Prac. Man. (BNA) 405:6681, at 6694 (Mar. 19, 1990) ("EEOC Policy Guidance").

The Sixth Circuit, in *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir.), *cert. denied*, 506 U.S. 1041, 113 S. Ct. 831, 121 L. Ed. 2d 701 (1992), held that

> [u]nder a "*quid pro quo*" theory of sexual harassment, an employer is held strictly liable for the conduct of supervisory employees having authority over hiring, advancement, dismissal, and discipline, under a theory of *respondeat superior*.

See also Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644, 648 (6th Cir. 1986).

The First Circuit held that "an employer is strictly liable for the [*quid pro quo*] actions of its supervisors," in *Chamberlain v. 101 Realty, Inc.*, 915 F.2d 777, 785 (1st Cir. 1990). *See also Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988).

The Eighth Circuit stated that "[m]any circuits have held that '*quid pro quo*' sexual harassment violates Title VII and that the employer is strictly liable." *Crimm v. Missouri Pacific R.R.*, 750 F.2d 703, 710 (8th Cir. 1984).

The D.C. Circuit, in *Bundy v. Jackson*, 641 F.2d 934, 943 (D.C. Cir. 1981), stated that "an employer is liable for discriminatory acts committed by supervisory personnel."

B. A Majority of Circuits which have Addressed the Issue of "*Quid Pro Quo*" Sexual Harassment have Held or Acknowledged that Title VII Does Not Require an Additional Showing of an Economic Adverse Job Action.

Following this Court's rulings in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986), and *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 370-71 (1993), a majority of circuits have

ruled or acknowledged that a showing of economic harm is not necessary for employer liability to attach in sexual harassment cases where a supervisor makes a threat conditioning job benefits or detriments on the performance of sexual favors. *See* EEOC Policy Guidance at 3277-78 (when a supervisor "has made *or threatened to make* a decision affecting the victim's employment . . . [the supervisor] has exercised authority delegated to him by his employer" and the employer is liable). (Emphasis added); concurring and dissenting opinion of Chief Judge Posner at App. 52a-53a (conceding that requirement of a "company act" not the "orthodox" approach, and "has the curse of novelty").

The Third Circuit, in *Robinson*, recently held that:

> a *quid pro quo* violation occurs at the time when an employee is told that his or her compensation, etc. is dependent upon submission to unwelcome sexual advances. At that point, the employee has been subjected to discrimination because of sex. . . . Whether the employee thereafter submits to or rebuffs the advances, a violation has nevertheless occurred.

120 F.3d 1286, 1997 U.S. App. LEXIS 17800 at *25.

The Ninth Circuit, in *Nichols*, 42 F.3d at 513-14, also held that

> a supervisor's intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation constitutes *quid pro quo* sexual harassment.

Citing, 29 C.F.R. §§ 106.11(a)(1) and (2) (1993) ("EEOC Guidelines"); *Chamberlain*, 915 F.2d at 783; *Spencer v. Gen.*

Elec. Co., 894 F.2d 651, 658 (4th Cir. 1990); *Collins v. Baptist Memorial Geriatric Ctr.*, 937 F.2d 190, 196 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 989 (1992); *Highlander*, 805 F.2d at 648; and *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987). *See also Heyne v. Caruso*, 69 F.3d 1475, 1478 (9th Cir. 1995).

Overturning the district court's determination that economic loss was required in "*quid pro quo*" cases, the Second Circuit in *Karibian*, 14 F.3d at 778, held that "evidence of some job-related penalty" is not necessary for employer liability. A supervisor's *quid pro quo* demand is "equally unlawful under Title VII whether the employee submits or not" and whether or not it is carried out.[18] *Id.*

Several other circuits have similarly stated or held that *quid pro quo* sexual harassment has occurred when a threat is made which conditions a benefit or detriment on the performance of sexual favors. These circuits state that *an alternate* route to establishing liability for *quid pro quo* sexual harassment is where the victim can show that a economic job benefit was actually denied. Other circuits have similarly focused on whether the "employee's reaction" to the threat affected the terms and conditions of her employment, or on whether the supervisor has "threatened to make" a job benefit or detriment conditional upon the performance of sexual favors.

In *Cram v. Lamson Sessions Co.*, 49 F.3d 466 (8th Cir. 1995), *citing*, *Kauffman*, 970 F.2d at 186, the Eighth Circuit stated that a plaintiff must show that

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18. The Second Circuit expressly distinguished its decision in *Karibian* from its prior dicta in *Kotcher v. Rosa Sullivan Appliance Ctr., Inc.*, 957 F.2d 59 (2d Cir. 1992), and its prior holding in *Carerro v. New York City Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989), stating that *Carerro*'s reference to "adverse consequences" was "descriptive of the facts before the Court, [and did not] establish[ ] a *sine qua non* that employment decisions be 'adverse' in order to state a valid claim." *Karibian*, 14 F.3d at 778.

> her submission to the unwelcome advances was an express or implied condition for receiving job benefits *or* her refusal to submit resulted in a tangible job detriment.

(Emphasis added.)

The Fifth Circuit stated that *quid pro quo* harassment has occurred where a plaintiff's "reaction to the harassment" caused "a tangible adverse effect on the terms or conditions of her employment." *Ellert v. University of Texas, at Dallas*, 52 F.3d 543, 545 (5th Cir. 1995). "Tangible aspects of the terms and conditions of [the victim's] employment" was further defined as where the plaintiff's

> acceptance or rejection of the harassment [was] either an express or implied condition to the receipt of a benefit *or* the cause of a tangible adverse effect on the terms or conditions of her employment.

Id. (emphasis added.) *See also Collins*, 937 F.2d at 196 (*quid pro quo* harassment occurs when "job benefits [are] conditioned on the acceptance of the harassment").

The Sixth Circuit in *Highlander*, 805 F.2d at 648, stated that *quid pro quo* harassment occurred where

> submission to the unwelcome sexual advances of supervisory personnel [was] an express or implied condition for receiving job benefits *or* [where] the employee's refusal to submit to a supervisor's sexual demands resulted in a tangible job detriment.

(Emphasis added.) *See also Kauffman*, 970 F.2d at 187 (a tangible job detriment need not be economic, although a *de minimis* exception may exist for "temporary actions," such as

being assigned to a manual machine for one day, where "further remedial action is moot and no economic loss occurred"), *citing*, *Chamberlain*, 915 F.2d 783.

In *Chamberlain*, 915 F.2d at 783, 787, the First Circuit held that employer liability follows where the plaintiff's "reaction to [the supervisor's *quid pro quo*] advances affected tangible aspects of . . . her compensation, terms, conditions, or privileges of employment . . . ," and includes the situation where "a supervisor conditions the granting of an economic *or other* job benefit upon the receipt of sexual favors from a subordinate, *or* punishes that subordinate for refusing to comply." (Emphasis added.) *See also Lipsett*, 864 F.2d at 897-98.

In *Spencer*, 894 F.2d at 658, the Fourth Circuit stated that *quid pro quo* harassment is where "sexual consideration is demanded in exchange for job benefits." The Court further stated that *quid pro quo* includes the situation where "[t]he acceptance or rejection of the harassment must be an express or implied condition to the receipt of a job benefit." *Id.*

The Eleventh Circuit, in *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1559 (11th Cir. 1987), stated that by "making *or threatening to make* decisions affecting the employment status of his subordinates," a supervisor subjects the employer to strict liability. (Emphasis added.)

The Tenth Circuit's position with regard to an "economic loss" requirement in *quid pro quo* cases is less clear. In *Hicks*, 833 F.2d at 1413, the Tenth Circuit stated that "*[q]uid pro quo* harassment occurs when submission to sexual conduct is made a condition of concrete employment benefits." *Citing*, 29 C.F.R. § 1604.11(a)(1-2) (1986). The Tenth Circuit, however, focused on the actual denial of benefits in *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127, where it stated that, in a *quid pro quo* case,

"[i]f the plaintiff can show that she suffered an economic injury from her supervisor's actions, the employer becomes strictly liable." In its most recent case on the issue, *Harrison*, 112 F.3d 1437, the Tenth Circuit again defined *quid pro quo* sexual harassment as occurring " 'where specific benefits of employment are conditioned on sexual demands' by the victim's supervisor."

The D.C. Circuit, in contrast, held that non-economic harm alone was not sufficient to sustain a claim for *quid pro quo* sexual harassment, for "to hold otherwise would be to impose liability on the employer without evidence that the supervisor had acted as its agent." *Gary v. Long*, 59 F.3d 1391, 1396 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569 (1995).

II.

THE PETITION SHOULD BE DENIED BECAUSE THE OPINION BELOW ON THE ISSUE OF *QUID PRO QUO* SEXUAL HARASSMENT IS IN HARMONY WITH THIS COURT'S RULING IN *MERITOR*, AND WITH THE COMMON LAW OF AGENCY.

A. Employer Liability in Cases of "*Quid Pro Quo*" Sexual Harassment Follows This Court's Directive in *Meritor* to Look to "Agency Principles" to Determine Who Acts as an "Agent" under Title VII.

Title VII defines "employer" as "any agent of" an employer. 42 U.S.C. § 2000e(b). This Court, in *Meritor*, 477 U.S. at 72, declined, based on an incomplete factual record, to issue a definitive ruling on employer liability for sexual harassment by supervisors. Instead, this Court directed the lower courts to look to "agency principles for guidance" when supervisors are involved, noting that "absence of notice to an employer does

not necessarily insulate that employer from liability."[19] *Id.*, *citing*, *generally*, Restatement § 219-237.

Under § 219 of the Restatement, a supervisory employee with authority to hire, fire, discipline, assign tasks, promote, or control the workplace environment of a subordinate employee, can impute liability to his/her corporate employer for his/her sexual harassment of that subordinate employee under a "scope of authority," "apparent authority," or "delegated authority" analysis. Without these "abuse of authority" avenues for liability, employer liability could also be determined under a negligence theory.[20] (App. 206a.) *See* plurality opinion of Judge Flaum and

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19. Similar to Burlington's arguments in the instant case, the district court in *Vinson v. Taylor*, 23 FEP Cases (BNA) 37, 42 (D.D.C. 1980), also attempted to impose a notice requirement in supervisor sexual harassment cases. This Court, however, held that the district court erred in imposing a notice requirement, and that courts should instead look to agency principles. *Meritor*, 477 U.S. 57. In affirming and remanding the Appellate Court decision, *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985), this Court held that it was "wrong to entirely disregard agency principles." *Meritor*, 477 U.S. at 72-72. Although the Appellate Court had acknowledged the district court's finding that "there was no evidence as to [the alleged sexual harasser's] status in the bank," it had held that "a supervisor, *whether or not* he possesses the authority to hire, fire, or promote, is necessarily an 'agent' of his employer . . .". *Vinson*, 753 F.2d at 150 n.70; *Meritor*, 477 U.S. at 70 (emphasis added). In the instant case, it is undisputed that Slowik had supervisory authority over Ellerth, had authority over her to hire and fire (or at least to recommend these actions against her), had "ultimate decision-making power" regarding her promotion, and was the sole person from whom Ellerth could obtain permission for special customer projects. *See* Response to Burlington's Statement of the Facts of the Case, *supra*.

20. *See, e.g., Baskerville v. Culligan Intern. Co.*, 50 F.3d 428, 431 (7th Cir. 1995) (an exception to the "known or should have known" negligence standard is where the sexual harassment "takes the form . . .

(Cont'd)

concurring opinion of Judge Cudahy for "negligence with heightened duty of care" analysis.

Under § 219(1) of the Restatement, when a supervisory employee, acting within the scope of his authority, engages in sexual harassment, employer liability follows under the doctrine of *respondeat superior*. *See, e.g., Martin*, 48 F.3d at 1351 (the test is "whether the service itself in which the tortious act was done was within the ordinary course of such business or within the scope of such authority"). (App. 175a, 191a-195a, 223a-231a.) Whether the employee was acting "within the scope" of his authority could be determined under the applicable state law. (App. 175a, 143a-151a, 184a-186a, *citing, Green Hills*, 162 Ill. App. 3d 216, 113 Ill. Dec. 216, 514 N.E. 2d 1227; Rules of Decision Act, 28 U.S.C. § 1652.) The employer would also be

(Cont'd)
of an abuse of authority"). Ellerth was held to have waived negligence theory as a route for recovery by the majority of the *en banc* panel. (App. 6a; 174a, n.1.) Ellerth claims that this determination was made in error, as Ellerth plead all facts relevant to a negligence theory, and the sentence relied upon as constituting the waiver (Ellerth "in fact, *agrees* with Burlington that § 219(2)(b) does not apply to this case") was erroneously cited by the *en banc* opinion as appearing in Ellerth's answer to the petition for rehearing (with suggestion for rehearing *en banc*). (App. 28a, 59a, 214a, 199a-202a.) This "waiver" sentence appeared in Ellerth's reply to the original Appellant's Brief, was discussed at oral argument as "incorrect," and the facts supporting liability under a negligence theory were reiterated. The three-judge panel decision held that Ellerth had not waived negligence. (App. 174a; 174a, n.1; 206a-207a, 214a, 239a.) Thereafter, in her answer to the petition for rehearing *en banc*, Ellerth cited to negligence theory and delegated authority as providing avenues for employer liability under Title VII, while arguing that the three-judge panel decision (utilizing a scope of authority analysis) should not be overturned. In the *en banc* panel decision, Judges Wood, Easterbrook and Rovner stated that, "[i]f negligence were the standard for her 'hostile environment' claim, I would find that Ellerth is entitled to reach a jury on this theory." (App. 174a, 206a-207a.)

liable, under § 219(1), if s/he used his/her authority to hire, fire, discipline, assign tasks, promote or control the workplace environment in committing the sexual harassment. Restatement, §§ 228-230. (App. 175a, 191a-195a, 223a-231a.) *See Baskerville*, 50 F.3d at 431; *Saxton v. American Tel. and Tel. Co.*, 10 F.3d 526, 536 n.19 (7th Cir. 1993) ("of course, if someone in the employer's decision-making hierarchy engages in harassment . . . the acts of the managerial employee constitute the acts of the employer"); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) ("[t]he deliberate act of an employee acting within the scope of his authority is the act of the employer, for an employer, at least where it is a corporation, acts only through agents"); *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417 (7th Cir. 1986) (post-*Meritor*, stating that to hold the corporation liable for sexual harassment "simply means that someone at the decision-making level in the corporate hierarchy has committed the wrong; the deliberate act of such a person is the corporation's deliberate act"). The Seventh Circuit similarly stated in *Horn v. Duke Homes, Div. of Windsor Mobile Homes*, (a pre-*Meritor* case), that:

> by delegating power to [the supervisor,] the "employer" and [the supervisor] essentially merged; as long as the tort complained of was caused by the exercise of this supervisory power, [the supervisor] should be deemed as acting within the scope of his employment, and the employer should be held liable for the tort.

755 F.2d 599, 605 (7th Cir. 1985). The analysis under § 219(1) does not impose "strict liability"[21] on employers, as an employer can contest the allegation that the supervisor was acting within the scope of his authority when s/he committed the sexual harassment. *See* Restatement, §§ 228-230. (App. 175a.) As such,

21. *See* n.16, *supra*.

it is consistent with *Meritor*'s holding that employer liability does not follow merely by proving the existence of a supervisory relationship. (App. 151a, 175a-176a; 176a, n.2.)

As an alternate or additional theory for determining employer liability under Title VII, § 219(2)(d) of the Restatement provides two avenues for imposition of this liability when the supervisor is acting outside the scope of his employment: apparent authority and delegated authority. Under a delegated authority analysis, if a supervisory employee abuses or "misapplies" the authority that was delegated to him/her by the employer, *i.e.*, "was aided in accomplishing the tort by the existence of the agency relation," the employer can be held liable. Restatement, § 219(2)(d)(cl.2). (App. 12a-14a, 51a, 194a-195a, 234a-238a.) *See, e.g., Nichols*, 42 F.3d at 513-14 (reasoning that "[a] harasser is able to grant [ ] job benefits or detriments only because he has actual or apparent authority to do so 'delegated to him by his employer' "); *Karibian*, 14 F.3d at 777 (observing that an employer is liable for *quid pro quo* sexual harassment "[b]ecause the *quid pro quo* harasser, by definition, wields the employer's authority to alter the terms and conditions of employment"). Under this second clause of § 219(2)(d), the supervisor is able to "misapply" the powers delegated to him by the employer because of "apparent authority." (App. 17a, 236a-237a.)

The "apparent authority" analysis of the first clause of § 219(2)(d) examines whether the victim had a "reasonable belief" that the supervisor was using actual authority delegated to him/her by the employer in committing the sexual harassment.[22] The employer would be liable in such cases

22. Both the three-judge panel held and the *en banc* panel found that the facts alleged in Ellerth did not implicate an "apparent authority" theory, as "[n]o one doubts that Slowik was a Vice President for Burlington, and thus that he was its agent in some respects." (App. 19a-20a, 63a, 236a.)

because of "manifestations" that made it reasonable for the victim to believe that the sexual harasser was acting within his/her actual authority. (App. 19a-20a, 63a, 175a, 235a-237a.) Liability under either of the § 219(2)(d) theories is not "strict", as an employer can negate liability by showing that the authority to hire, fire, discipline, assign tasks, promote, or control the workplace environment of the subordinate employee was not delegated to the supervisor by the employer, or the employee could not have believed that it was, due to the employer's manifestations to the contrary. (App. 175a, 237a.)

B. Under *Meritor*, and as Codified by The Civil Rights Act Of 1991, Non-Economic Harm is Compensable under Title VII.

As this Court stated in *Meritor*, 477 U.S. at 64-65,

> the language of Title VII is not limited to "economic" or "tangible" discrimination . . . [but instead] evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.

In *Harris*, this Court further concluded that:

> Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employee's psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.

114 S. Ct. at 30-71. *See also* Civil Rights Act of 1991, 42 U.S.C.

§ 1981a(b) (providing compensation for emotional damage). Because the authority to threaten to use the power to hire, fire, discipline, assign tasks, promote, or control the workplace environment is within the scope of authority of the supervisory employee, or within the authority delegated to that employee, application of agency principles to the context of "*quid pro quo*" sexual harassment yields employer liability when such power has been abused. *See, e.g., Robinson*, 120 F.3d 1286, 1997 U.S. App. LEXIS 17800 at *25; *Nichols*, 42 F.3d at 513-14 (collecting cases); *Karibian*, 14 F.3d at 778; *Horn*, 755 F.2d at 604-05 (a pre-*Meritor* case, holding that *quid pro quo* harassment occurs the moment a supervisor conditions a job benefit on performing sexual favors).[23]

Application of common law agency principles to the instant context in consistent with the deterrent purposes of Title VII, as well. As stated by Judge Flaum, "[c]ompanies' efforts to deal with sexual harassment should be systematic and proactive, rather than discrete and reactive." (App. 15a-16a.) "Employer's are quite capable of monitoring a supervisor's actions affecting the work environment without engaging in Orwellian surveillance." (App. 180a.) Companies can "hire, train and promote employees with an eye toward preventing undesirable behavior," as well as implement grievance procedures and, on a case by case basis, discipline offending employees. (App. 15a.) The "costs of preventing future harassment essentially represent an investment in long-term freedom from liability." (App. 16a.)

As this Court recognized in *Meritor*, it is the law of agency that is best suited for use in determining whether an employer

23. *Knox v. State of Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) (economic harm not required for relief under retaliation provisions of Title VII); *Smart v. Ball State Univ.*, 89 F.3d 437, 440-41 (7th Cir. 1996) (same); *Dunning v. Simmons Airlines, Inc.*, 62 F.3d 863, 868 (7th Cir. 1995) (same).

is liable for sexual harassment by a supervisory employee, no matter what the actions of the supervisory employee. (App. 186a.) By clarifying to employer's that they will be held liable under agency principles when their supervisory employees (within the scope of their authority, apparent authority, or by using the authority delegated to them by the employer) engage in sexual harassment, the deterrent power of Title VII will be increased, as employers improve the training and monitoring of their supervisory employees to whom they have entrusted such powers, and victims will be compensated when these supervisory powers are abused.

CONCLUSION

Accordingly, Respondent respectfully requests that Burlington's petition for a writ of certiorari be denied.

Respectfully submitted,

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